IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 23 of 2001

For Approval and Signature:

HONOURABLE MR.JUSTICE R.S.GARG

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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COMMISSIONER OF INCOME TAX - Applicant(s)
Versus
GUJARAT STATE FOREST DEVELOPMENT CORPORATION LTD. - Respondent(s)

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Appearance :
MR MANISH R BHATT for Applicant(s) : 1,
MR JP SHAH for Respondent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE R.S.GARG
and
HONOURABLE MR.JUSTICE M.R. SHAH

Date : 31/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.R. SHAH)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'A' has referred the following question to this Court for opinion, arising out of Income Tax Appeal No. 4585/Ahd/92 relating to Assessment Year 1985-86;

> 'Whether on the facts and in the circumstances of the case the Tribunal is right in law in holding that the royalty cannot be treated as 'tax' or 'duty' within the meaning of sec. 43B when it is clearly held by Supreme Court in the case of India Cement Company (188 ITR 690) that royalty is a tax ?'

2. The facts, for the purpose of deciding the present Reference, are that the assessee company was engaged in the business of various development and procurement and sale of forest produce. The assessment order came to be passed under Section 143(3) of the Income Tax Act on 30th December 1987. The Commissioner of Income Tax, Vadodara, set aside the assessment order exercising his revisional powers under Section 263 of the Income Tax Act vide order dated 8.3.1990. It appears that the said order of the Commissioner, Income Tax was a subject matter of appeal before the Tribunal and the Tribunal vide its order dated 8.7.1994 in I.T.A. No. 1863/Ahd/90 allowed the assessee's appeal. In the meantime, the Assessing Officer passed a fresh assessment order under Section 143(3) read with Section 263 of the Act on 23rd August 1991. The order passed by the Assessing Officer was challenged before the Commissioner of Income Tax (Appeals) and the C.I.T. (A) disposed

of the said appeal vide order dated 30th September 1992 in favour of the assessee. The appeal came to be filed before the Tribunal by the Revenue and the Tribunal, relying upon the decision of the Supreme Court in the case of India Cement Company Vs. State of Tamil Nadu, 188 ITR 690, dismissed the appeal and confirmed the order passed by the C.I.T. (A).

3. The question, under consideration, is whether the royalty paid by the assessee can be said to be a tax or duty within the meaning of Section 43B of the Act or not. The Assessing Officer held that the royalty paid by the assessee was 'tax' or 'duty' with the meaning of Section 43B of the Act. As stated above, on appeal, the C.I.T. (A) held that the royalty payable by the assessee, Gujarat State in exploiting the State owned forests at the rates fixed by the State Government on the basis of the quantity of MFP extracted therefrom by virtue of appointment as sole agent by the Gujarat State for such purpose is neither 'tax' or 'duty' within the meaning of Section 43B of the Act. The Tribunal considered its own judgment in assessee's own case in ITA No. 1863 and 1864/Ahd/90 for assessment year 1985-86 and 1986-87, and dismissed the appeal.

4. It appears that, earlier the Supreme Court in the case of India Cement Ltd (supra) held that royalty is a 'tax'. However, the said decision came to be clarified by the Supreme Court in the case of State of West Bengal Vs. Kesoram Industries Ltd., 2004 Vol. 266 ITR Page 721 [at Page 762], and the Supreme Court observed that the word 'royalty' occurring in the

expression 'royalty is a tax', as mentioned in Paragraph 34 of the said Judgment, is clearly an error. The Supreme Court, in the case of State of West Bengal v. Kesoram Industries Ltd., has observed as under;

> "We would like to avail this opportunity for pointing out an error, attributable either to a stenographer's devil or to sheer inadvertence, having crept into the majority judgment in *India Cement Ltd.'s* case [1990] 1 SCC 12 (supra). The error is apparent and only needs a careful reading to detect. We feel constrained-rather duty-bound-to say so, lest a reading of the judgment containing such an error-just an error of one word-should continue to cause likely embarrassment and have adverse effect on subsequent judicial pronouncements which would follow *India Cement Ltd.'s* case [1990] 1 SCC 12, feeling bound and rightly, by the said judgment having the force of pronouncement by seven-Judges Bench. Paragraph

34 (page 30) of the report reads as under :

> "In the aforesaid view of the matter, we are of the opinion that royalty is a tax, and as such a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature because section 9 of the Central Act covers the field and the State Legislature is denuded of its competence under entry 23 of List II. In any event, we are of the opinion that cess on royalty cannot be sustained under entry 49 of List II as being a tax on land. *Royalty on mineral rights is not a tax on land* but a payment for the user of land."(underlining by us).

In the first sentence the word "royalty" occurring in the expression-"royalty is a tax", is clearly an error. What the majority wished to say, and has in fact said, is--" cess on royalty is a tax". The correct words to be printed in the judgment should have been "cess on royalty" in place of "royalty"

only. The words “cess on” appear to have been inadvertently or erroneously omitted while typing the text of judgment. This is clear from reading the judgment in its entirety. Vide paras, 22 and 31, which precede para.34 above said, their Lordships have held that “royalty” is not a tax. Even the last line of para.34 records “royalty on mineral rights is not a tax on land but a payment for the user of land”. The very first sentence of the paragraph records in quick succession”....as such a cess on royalty being a tax on royalty, is beyond the competence of the State Legislature....” What their Lordships have intended to record is”....that cess on royalty is a tax, and as such a cess on royalty being a tax on royalty is beyond the competence of the State Legislature.....” That makes correct and sensible reading. A doubtful expression occurring in a judgment,

apparently by mistake or inadvertence, ought to be read by assuming that the court had intended to say only that which is correct according to the settled position of law, and the apparent error should be ignored, far from making any capital out of it, giving way to the correct expression which ought to be implied or necessarily read in the context, also having regard to what has been said a little before and a little after. No learned Judge would consciously author a judgment which is self-inconsistent or incorporates passages repugnant to each other. Vide para.22, their Lordships have clearly held that there is no entry in List II which enables the State to impose a tax on royalty and, therefore, the State was incompetent to impose such a tax (cess). The cess which has an incidence of an additional charge on royalty and not a tax

on land, cannot apparently be justified as falling under entry 49 in List II.

It is of significance for the issue before us, to determine the nature of royalty and whether it is a tax, and if not, then, what it is. Until the pronouncement of this court in *India Cement* [1990] 1 SCC 12, it has been the uniform and unanimous judicial opinion that royalty is not a tax."……

In India Cement (vide para, 31, [1990] 1 SCC 12) decisions of four High Courts holding "Royalty is not tax" have been noted without any adverse comment. Rather, the view seems to have been noted with tacit approval. Earlier (vide para.21,[1990] 1 SCC 12)the connotative meaning of royalty being "share in the produce of land" has been noted. But for the first sentence (in para 34, [1990] 1 SCC 12) which we find to be an apparent error,

nowhere else has the majority judgment held royalty to be a tax.……

We have clearly pointed out the said error, as we are fully convinced in that regard and feel ourselves obliged constitutionally, legally and morally to do so, lest the said error should cause any further harm to the trend of jurisprudential thought centering around the meaning of “royalty”. We hold that royalty is not tax. Royalty is paid to the owner of land who may be a private person and may not necessarily be the State. A private person owning the land is entitled to charge royalty but not tax. The lessor receives royalty as his income and for the lessee the royalty paid is an expenditure incurred. Royalty cannot be tax. We declare that even in India Cement [1990] 1 SCC 12 it was not the finding of the court that royalty

> is a tax. A statement caused by an apparent typographical or inadvertent error in a judgment of the court should not be misunderstood as declaration of such law by the court. We also record our express dissent with that part of the judgment in Mahalaxmi Fabric Mills Ltd. which says (vide para.12 of [1995] Supp.1 SCC 642 report) that there was no “typographical error” in *India Cement* [1990] 1 SCC 12 and that the said conclusion that royalty is a tax logically flew from the earlier paragraphs of the judgment.”

5. In view of the decision of the Supreme Court, in the case of Kesoram Industries Ltd. (supra) holding that royalty is 'not a tax', it is held that the Assessing Officer committed an error in treating the royalty paid by the assessee as 'tax' or 'duty' within the meaning of Section 43-B of the Income Tax Act, and the Commissioner of Income Tax (Appeals), and the Tribunal were justified in holding that the royalty paid by the assessee cannot be treated as 'tax' or 'duty' within the meaning of Section 43B of the Income Tax Act. The Reference is answered accordingly in favour of the assessee and against the

Revenue. The Reference is disposed of accordingly. No costs.

[R.S. Garg, J.]

[M.R. Shah, J.]

RMR.